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In the Supreme Court of the United States.

FEDERAL TRADE COMMISSION, PETITIONER,
v.
THE CURTIS PUBLISHING COMPANY, RESPONDENT.
No. 86.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

This case comes to this court on a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Third Circuit, entered on March 2, 1921 (*Curtis Pub. Co.* v. *Federal Trade Commission*, 270 Fed. 881), which judgment set aside an order of the Federal Trade Commission issued on July 21, 1919, which required the respondent, a publisher of magazines, to cease and desist from entering into contracts with wholesale dealers, by the terms of which they were prohibited from dealing in, or distributing at wholesale, periodicals other than those of the respondent, without its consent (which was uniformly denied as to certain competing publications), and from enforcing, or requiring observance of, any such contracts then existing.

The commission's original complaint (R. 4)[1] was issued on July 5, 1917, and, briefly stated, charged the respondent with engaging in the use of unfair methods of competition by contracting with wholesale dealers, termed by the respondent "district agents," not to carry periodicals of competitors, and with violating the provisions of section 3 of the Clayton Act by the making and enforcing of those contracts, the effect of which, it was alleged, was to substantially lessen competition and tend to create monopoly. The clause of the contract which constituted the principal ground of the original complaint is as follows:

> That the district agent hereby covenants and agrees * * * to refrain hereafter from wholesaling to boys or dealers (and from attempting to influence any Curtis agent to sell) any periodicals other than those published by the Curtis Publishing Company * * * without first obtaining the approval of the publishers (Curtis Publishing Co.).

To this complaint respondent filed an answer (R. 9).

Subsequent to the issuance of the original complaint (T. 1305) by the commission, and before the completion of the taking of testimony, respondent changed the form of its contract, but retained a covenant therein practically identical with that in the contract which

[1] The record before the court in this case consists of a small volume, unnumbered, containing the record in the Circuit Court of Appeals, and four volumes, numbered I, II, III, and IV, which contain a transcript of the entire proceeding before the commission. References to the record in the Court of Appeals are marked in this brief, "R.", with the proper page numbers, and references to Vols. I, II, III, and IV, are marked "T.", with the proper page numbers.

was made the subject of the original complaint. The clause in the second contract was as follows:

> That without the written consent of the publisher, he (the dealer) will not * * * act as agent for or supply at wholesale rates any periodicals other than those published by the publisher (the respondent herein).

Thereupon, the commission, on April 8, 1918, issued an amended complaint (T. 59) amplifying the charges in the original complaint and covering the new contract of the respondent.

To this amended complaint the respondent filed an amended answer (T. 63).

The issues being thus joined, testimony, to the extent of approximately 3445 printed pages, was taken before an examiner, and at the conclusion thereof the case was argued before the commission.

On July 21, 1919, the commission made its report and findings as to the facts and its conclusions thereon, which were to the effect that the respondent had violated both section 5 of the trade commission act and section 3 of the Clayton Act. An order requiring respondent to cease and desist from such violations was issued. The material parts of the order are as follows:

> NOW, THEREFORE, IT IS ORDERED, That the respondent, Curtis Publishing Company and its officers, directors, agents and employees, cease and desist, while engaged in competition in commerce among the several States and Territories of the United States and the District of Columbia, from entering

into any contracts, agreements or understandings with persons, partnerships or corporations already engaged in the sale or distribution of the magazines or newspapers, or both, of other publishers, which provide that such persons, partnerships or corporations shall not act as agents for, sell, or supply to others at wholesale rates, any periodicals other than those of respondent without the written consent of respondent; and from entering into any contracts, agreements or understandings with persons, partnerships or corporations already engaged in the sale or distribution of the magazines or newspapers, or both, of other publishers, which provide that such persons, partnerships or corporations shall not sell or distribute, or shall not continue to sell or distribute, the magazines or newspapers, or both, of other publishers; and from enforcing any provision which may be contained in any of respondent's present outstanding contracts with persons, partnerships or corporations now engaged in the sale or distribution of magazines or newspapers, or both, of other publishers, which provide that such persons, partnerships or corporations shall not sell or distribute the magazines or newspapers, or both, of other publishers, or shall not sell or distribute the magazines or newspapers, or both, of other publishers without the written consent of respondent. (T. pp. 94–95).

It may be stated at the outset that respondent contended in the court below, that this order prevented the Curtis Company from employing a re-

tailer, who had theretofore been engaged in handling the periodicals of competitors of respondent *at retail*, to act as the wholesale agent of respondent and to provide that such retailer should not carry *at wholesale* the publications of competitors of respondent. But when the order is read in the light of the findings, it becomes obvious that no such application as is contended for by respondent was intended, inasmuch as the findings are limited to contracts with *wholesale*, as distinguished from retail, dealers *already engaged in the sale at wholesale* of publications of competitors. If the order is open to such interpretation and application as the respondent urged below, the petitioner has no objection to the insertion of the words "at wholesale" after the word "distribution" in lines 11, 21 and 31 of the order as printed above.

THE FACTS.

The respondent is a corporation engaged in the publication and sale of the Saturday Evening Post and The Country Gentleman, both weekly publications, and of the Ladies Home Journal, a monthly publication. The Post is devoted to fiction, special articles on current events, and an editorial page. The Ladies Home Journal is primarily a woman's magazine, and is devoted chiefly to current styles and fashions, housekeeping matters and fiction. The Country Gentleman contains articles of interest to farmers and the country gentry, on such subjects as the production and care of principal crops from the land, as well as fruits of all descriptions, beautification

of country places and farms, statistics of production, methods of distribution, and generally on all topics of interest to country residents. The corporation is one of very large financial resources, having, at the institution of this proceeding, capital stock outstanding to the amount of $25,000,000. Its publications are edited and printed at Philadelphia, Pa., and from there sold to persons in the various States of the Union and in foreign countries.

Methods of distributing newspapers and periodicals.

Newspapers, magazines, and periodicals are distributed to readers through four channels: (1) The United States mails; (2) the American News Company; (3) local wholesale dealers; and (4) special representatives in certain communities, distributing at wholesale for an individual company.

1. Subscribers' copies of practically all publications having a distribution covering any substantial territory are delivered by United States mail. The mails are also employed to a minor extent for forwarding copies direct to retail dealers.

2. The American News Company is a large corporation which purchases magazines and periodicals and sells them to retail dealers only for further sale by them to readers. This company maintains branches in sixty of the principal cities of the United States (T. 106) and has delivery stations at forty additional points. Dealers located in cities and towns where no branch or delivery station is maintained make their purchases of papers and periodicals

from this company by mail, telegraph, or telephone orders, which are filled by shipment by either mail, express, or freight. The dealer pays the transportation charges from the News Company's branch or distributing station to his place of business, as well as transportation charges back to the News Company on unsold, returnable copies (T. 228). Even in the cities where branches or delivery stations are maintained, the company makes a charge for delivery of magazines or periodicals to the dealer (T. 197, 467, 563, 669–670). Since the company's branches or distributing stations are somewhat widely separated (T. 227–228), the transportation charge is of some importance; and the time and expense involved in filling orders are also items to be considered. Many publishers of magazines and periodicals depend entirely upon this company for the distribution at wholesale of their publications.

3. The third channel of distribution is through local wholesale dealers. The development of wholesale dealers who handle newspapers and magazines has been of comparatively recent date. The beginnings of the system are not shown in the record, but the movement apparently took on a decided impetus about 1905 or 1906, when some of the daily newspapers sought to induce one capable man of experience in handling newspapers to enter the business in each of a number of cities. (T. 137, 949–956, 976–984.) From about that time there has been a steady development of the business of wholesaling newspapers, magazines, and periodicals, and

at the time this proceeding was begun, a substantial number of magazines, particularly those of very large circulation, published by powerful concerns, had come to be distributed through wholesale dealers. Some of these publishers have entirely abandoned the American News Company as a means of distribution and rely solely upon wholesale dealers (T. 360).

The more important of these wholesale dealers are located in the various large cities and sell locally (T. 976–983). They buy magazines, newspapers, and periodicals direct from the publishers and sell them to both retail news dealers and to boys who sell papers on the streets or deliver them to customers at their homes. The large wholesale dealers own or hire automobile trucks, automobiles, wagons, or other vehicles for delivery purposes; and the less important ones use trolley lines and other public means of transportation, bicycles, etc. (T. 109, 349, 467, 477, 519, 526, 534, 576, 589, 590, 626, 651, 668, 687, 712, 734, 793, 981). Practically all wholesale dealers deliver the publications to purchasers without any charge whatever for such delivery. Those wholesalers who handle newspapers deliver them daily to the retail dealers and to boys, (T. 590, 651) and through their employees they are therefore in daily contact and conference with the retail trade. Because of this daily contact, orders for additional copies of current issues of magazines and periodicals can be made by the dealer any day and almost immediately be filled; whereas, dealers purchasing magazines or peri-

odicals from the American News Company must, in those cities where branches are not maintained, send orders for additional copies long distances, and, necessarily, considerable time elapses between forwarding the order and the receipt, by mail or express, of the additional copies. These daily visits also afford an opportunity to the wholesaler to inspect the display made by the dealers of the papers, magazines, and periodicals sold by the wholesaler and to urge that favorable display thereof be made (T. 1848).

There are a considerable number of wholesale dealers who do not carry newspapers at all, but confine their business to magazines and periodicals only. While usually maintaining less extensive equipment for delivery purposes than the larger dealers who carry both daily papers and magazines, their business is conducted along the same general lines.

Some of the wholesale dealers were originally so-called "Curtis boys"—that is, boys who had sold the Curtis Company publications on the street and from house to house, who had received such assistance and instructions in this work as the Curtis Company renders to boys handling its publications, and who, having proven to be efficient salesmen, were given the work of wholesaling the Curtis publications in their city, community, or town.

As is pointed out elsewhere (*post*, pp. 13, 29, 54), the commission's order does not apply to these last named "Curtis Boy" dealers, and does not in any way affect the relations of the Curtis Company with them.

The large wholesale dealers carrying newspapers, magazines, and periodicals sell in their particular territory to a large number of retail dealers many of whom are not reached by the American News Company. (T. 470, 524, 526, 552, 562, 576, 585, 652, 687, 723, 768, 835, 907, 945, 1049, 1070, 1130, 1228, 1247, and 1848.)

These large wholesale dealers sell newspapers, magazines, and periodicals to large numbers of boys also; and a substantial number of wholesale dealers who carry magazines and periodicals only also sell to boys. These boys may be divided into three classes—(1) those who sell newspapers only; (2) those who sell newspapers, magazines, and periodicals, including, among others, the Curtis Company's publications; and (3) those who sell the Curtis publications only. The latter class is composed chiefly of boys who having been, recruited by the Curtis Company by advertising or otherwise and induced to handle the Curtis publications, have been turned over to the local wholesaler handling the Curtis publications. These boys receive from time to time such instructions and help in their work as the Curtis Company renders. The Commission's order does not prohibit the Curtis Company from contracting for the exclusive services of these boys. Classes (1) and (2) of boys above mentioned have no relation whatsoever to the respondent company. They are boys who are engaged in the sale of newspapers or magazines, or both, on the streets or to regular

customers, who have not received any instructions or training whatsoever from the respondent, and are under no obligation, legal or moral, to the respondent company.

In the case of many large wholesalers, the proportion of "Curtis boys" to the whole number of boys to whom the dealer sells is very small. The witness O'Donnell sells to 300 boys of whom 30 are "Curtis boys" (T. 1115); the witness Soloman sells to 200 boys of whom approximately 20 are "Curtis boys" (T. 1195); the witness Seidler sells to 50 boys of whom approximately 10 are "Curtis boys" (T. 849); the witness West sells to 100 boys of whom approximately 4 are "Curtis boys" (T. 519); the witness Goldsmith to 125 boys of whom approximately 2 are "Curtis boys" (T. 534); the witness Boland to 250 of whom 80 are "Curtis boys" (T. 547); the witness Carroll to 60 of whom approximately 11 are "Curtis boys" (T. 560); the witness Katze to 125 of whom 10 are "Curtis boys" (T. 573–574); the witness Reiser to 2,100 boys of whom 4 were "Curtis boys" (T. 590); the witness Schlafman to 250 boys of whom approximately 60 are "Curtis boys" (T. 621). These illustrations can be largely extended by reference to the testimony of other wholesalers in the record. (T. 584, 607, 628, 639, 651, 667, 701-02, 735, 795, 820, 836, 947, 1071, 2919.)

In numerous instances only one wholesale dealer is to be found in a given city or town (T. 151, 152, 153, 185, 231, 232, 233, 234, 235, 236, 266–267, 429, 526,

549, 584, 590, 609, 652, 687, 694, 712, 733, 742, 754, 763, 791, 835, 849, 905, 1069, 1099, 1182, 1683, 1758, 1854), while in others, the wholesaler under contract with the Curtis Company is by far the most efficient and best equipped dealer in the community.

4. The fourth method of distributing publications is by special representatives in certain cities or towns. In some instances these representatives devote their entire time to such distribution. In others such local representatives are engaged in some other business, as retailers of newspapers and periodicals, or retail dealers in other lines, and are induced by the publishers to act as wholesalers in that community for their publications. These dealers or representatives frequently begin with the publications of a single company, and subsequently take on other periodicals until a substantial business is built up and they may be classed as wholesale dealers. On the other hand, they quite frequently handle the publications of but one company. Publishers of but one periodical have difficulty at times, however, in inducing parties to wholesale it, as it does not ordinarily pay to wholesale a single publication (T. 186, 213, 522–523, 1125), nor will the handling of a single publication warrant the amount of work among news stands and boys necessary to efficient distribution. The same number of employees and the same equipment for delivery could be utilized for several publications, and thus the cost of handling be greatly reduced.

Character and number of dealers with whom respondent had contracts, and limits of Commission's order.

The respondent company, at the time of the institution of this complaint, had outstanding contracts with approximately 1,535 so-called district agents. Of the parties so under contract with respondent, approximately 447 had, previous to entering into such contracts, been engaged in selling *at wholesale* newspapers or magazines, or both, of publishers other than the respondent. In other words, they were established wholesale dealers.

The commission's order directed the respondent to cease and desist from entering into contracts with such general wholesale dealers, in which was incorporated a covenant not to act as agent for or distribute at wholesale the publications of competitors, and to refrain from enforcing this covenant in its existing contracts with the 447 general wholesale distributors above referred to.

Of the 1,535 so-called district agents with which respondent had contracts at the time of the institution of this proceeding, approximately 1,088 had not, prior to entering into such contracts with respondent, been engaged in selling or distributing the newspapers or publications of publishers other than the respondent, many of these 1,088 persons having been recruited from the respondent's "school boy" organization, composed of the boys who sold respondent's publications at retail. The commission's order does not apply to respondent's contracts with these 1,088

distributors, nor in any way disturb their relations with respondent company.

The respondent has strictly enforced, as to all immediate competitors, the clause in its contracts which prohibits the wholesale dealers from acting as agent for, or distributing at wholesale, the publications of any competitor without the written consent of respondent. Consent to handle such publications has been consistently refused to wholesale dealers applying for permission to handle them. In instances, threats have been made of enforcing the penalty clause of the contract if competitors' publications were carried, but no suit appears to have been instituted to enforce the penalty. In a number of instances the dealers persisted in handling such immediate competing publications, and respondent canceled its contract with such dealers and denied them further copies of its publications at wholesale rates. (T. 2702, 2747, 1137, 1054, 1069, 209, 227, 3268, 3356, 208, 465, 249, 1218–19.) Many dealers, who applied to respondent for permission to carry immediately competing publications, and whose application was denied, complied with the requirement of the contract and declined to take on competing publications. (T. 147–154, 211, 212, 214, 217, 219, 237, 238, 239, 287, 289, 336, 496–497, 583, 618, 648, 699, 716, 751, 788, 791, 830–834, 890–894, 1122, 1164, 1193.)

Respondent's competitors against whom its contracts were enforced.

The principal publications which are practically identical in character and quality of contents with respondent's publications, and which respondent has declined to permit wholesale dealers to carry, are the Woman's Home Companion and Every Week, immediate competitors, respectively, of the Ladies Home Journal and the Saturday Evening Post, and Farm and Fireside and the American Magazine, not immediate competitors of the Curtis publications, all published by the Crowell Publishing Co.; the Pictorial Review, an immediate competitor of the Ladies Home Journal, published by the Pictorial Review Co.; McCall's Magazine, a competitor of the Ladies Home Journal, published by the McCall Co.; the Delineator, the Designer, Woman's Home Magazine, and Everybody's—the Delineator and Woman's Home Magazine being competitors of the Ladies Home Journal, all published by the Butterick Publishing Co. (formerly the Publishers' News Co.). To these may be added Collier's Weekly and the Literary Digest, both, in some measure, competitors of the Saturday Evening Post, though as to these two publications the objection was usually limited to sales to boys.

The combined monthly circulation of the publications of the Curtis Company (converting the weekly circulation of the Saturday Evening Post and the Country Gentleman into copies per month, allowing

four weeks per month) is 11,350,000 copies. The combined monthly circulation of the Crowell Publishing Company's publications, the Woman's Home Companion and Every Week—immediate competitors of the Curtis Company's publications—is 3,500,000, and the combined monthly circulation of these two publications and the Farm and Fireside and the American Magazine is 4,950,000. The monthly circulation of the Pictorial Review is 1,400,000; of McCall's Magazine, 1,310,660. The circulation of the Delineator is approximately 1,000,000 copies per month. The combined weekly circulation of the Curtis Publishing Company's two weekly publications, the Saturday Evening Post and the Country Gentleman, is 2,400,000 copies; of Every Week, published by the Crowell Company, 600,000; of the Literary Digest, approximately 300,000 copies per week. The circulation of Collier's Weekly is approximately 1,000,000 copies per week.

From these figures it will be seen that the combined circulation of the Curtis Company's publications far exceeds the combined circulation of the publications of any single company publishing magazines or periodicals immediate competitors of the Curtis Publishing Company's publications.

Respondent has not depended upon the mere existence of its contracts with wholesalers to prevent competitors from selling to them, but when it has learned on various occasions that its immediate competitors were seeking to sell to the wholesale dealers, it has not awaited requests from dealers for the privi-

lege of handling such publications, but has immediately launched a campaign of opposition, circularizing the dealers, advising them of its objection to their handling particular publications, warning them of the consequences, and insisting upon the observance of its contracts. When the Pictorial Review sought to inaugurate a policy of selling to wholesalers in 1916, the respondent sent an identical letter to all dealers handling 750 or more copies of the Saturday Evening Post (Commission's Ex. 2, T. 281) cautioning them not to handle other publications and directing attention to the fact that the agreement covered sales to retail news stands as well as to boys. These letters were followed by others upon the same subject, containing a warning that the only dealer who had persisted in handling the Pictorial had lost his contract with respondent (Commission Ex. 3, T. 281). In the years 1915–1916, when the Crowell Publishing Company sought to place its publications, the Woman's Home Companion, Every Week, and the American Magazine, with the wholesale dealers, a similar campaign of warning and insistence upon dealers observing their contracts was inaugurated (T. 207–211; 213–220; *see also* Commission's Ex. 193, T. 1440).

The respondent was successful in most instances in preventing dealers under contract with it from handling these competing publications (ante p 14). While declining to permit these wholesale dealers to handle these publications, the respondent interposed no objection to their handling the Hearst publica-

tions, Munsey publications, and probably others. (T. 772, 765, 766, 1064, 1067, 1444, 1513.) The record fully supports the statement that wholesale dealers had ample facilities to handle the publications of respondent's competitors, which respondent declined to permit them to handle under its contract, without detriment to the service rendered to respondent. (T. 213, 311, 714–715, 1005, 1035, 1063, 1065, 1125, 1582.) Some publishers encourage the dealers to take on additional publications in order to increase the dealer's business, and thus to make it more profitable and more efficient. (T. 949–953, 955.)

The court below while holding that the commission's findings as to the facts were supported by the evidence, made additional findings of its own which are in part contrary to the findings of the commission, and some of these not contrary to the findings of the commission are, nevertheless, contrary to the weight of the evidence. On the basis of these additional findings the court held:

1. That both of the contracts of respondent were contracts of agency and that they did not therefore violate section 3 of the Clayton Act, which applies to sales and contracts for sale.

2. That the use of the contracts did not amount to an unfair method of competition apparently for the reason, (*a*) that to permit the respondent's real competitors to sell to the wholesale dealers would disrupt the respondent's selling organization and deprive it of the exclusive services of its schoolboy organization, in which organization the court ap-

pears to hold that it had some sort of exclusive right; (*b*) that the contracts did not restrain commerce but enlarged it; and (*c*) that the respondent's competitors had other means by which they could distribute their publications, viz, the United States mails and the American News Company.

ERRORS OF THE COURT BELOW.

It is respectfully urged that the judgment of the circuit court of appeals should be reversed, for the reason that the court erred:

1. In holding that it was empowered to make, and in making, findings of fact in addition to those made by the commission; instead of remanding the case to the commission for findings on such additional points as, in the opinion of the court, were necessary to a decision.

2. In making findings contrary to the commission's findings, which the court held to be supported by evidence and conclusive upon it; and in making additional findings, some of which were contrary to the evidence.

3. In holding that the respondent's contracts with wholesale dealers were contracts of agency and not contracts of sale, and therefore did not violate section 3 of the Clayton Act.

4. In holding that the deposit made by the distributor under his contract with respondent was merely "an indemnity to secure payment for all copies the agent does not return," notwithstanding the fact that the contract specifically provides that

the deposit is held by respondent as cash security for the distributor's obligation, among others, to *sell* a specified number of respondent's publications.

5. In holding that the use of respondent's contracts was not an unfair method of competition.

6. In holding that the terms "unfair methods of competition" are coextensive with the terms "unfair competition" or "unfair trading" as known to the common law.

7. In holding that the effect of the contracts was not to substantially lessen competition and that they did not have a dangerous tendency unduly to hinder competition.

8. In holding that because respondent's competitors may distribute through the American News Company and the United States mails, respondent may by contract prevent its competitors from selling to wholesale dealers and through such dealers reaching many retail dealers and newsboys which they cannot reach either through the American News Company or through the mails.

9. In misconstruing the commission's order and on such misconstruction holding that it prevented respondent from employing its contracts in many cases to which the commission's order did not apply.

10. In holding that the respondent's right to protect its so-called boy organization justifies it in preventing by contracts with wholesale dealers, competitors from reaching through the medium of such dealers hundreds of boys not connected with respondent's "Boy Organization" and sustaining

no relation whatever, contractual or otherwise, to the respondent.

11. In holding that the respondent has a legal right to the exclusive patronage of the so-called "boy organization" or to the services of these boys.

ARGUMENT.

I.

The court erred in making additional findings.

The court below held that it was authorized by the statute to make additional findings if, in its opinion, the commission had failed to make findings upon points which the court regarded as material. It is submitted that this construction of the statute and of the court's jurisdiction is erroneous.

Section 5 of the trade commission act provides that the commission, after issuance of a complaint and the taking of testimony, shall, if it be of opinion that the method of competition in question is prohibited by the act, "make a report in writing in which it shall state its findings as to the facts." The section further provides that in the event the commission applies to the circuit court of appeals to enforce its order, or the person against whom such order runs shall petition the court to set it aside, the court of appeals "shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting

aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive."

Section 11 of the Clayton Act, which confers jurisdiction upon the commission to enforce sections 2, 3, 7, and 8 of that act, and prescribes the procedure to be followed, contains provisions identical with those above quoted from section 5 of the trade commission act respecting the conclusive character of the commission's findings.

It was the manifest purpose of Congress to make the commission the judge of the weight of the evidence and to make its findings conclusive upon the court if there was any legal evidence in the record to support them. This contention is supported by the decision of the Circuit Court of Appeals for the Fifth Circuit, in *Wholesale Grocers Assn. of El Paso* v. *Federal Trade Comn.* (277 Fed. 657), in which that court said:

> As above indicated, we are not of opinion that the order of the commission is subject to be set aside on the ground that no substantial evidence supporting its findings of fact was adduced. Failure to recognize or concede due probative effect to significant circumstances disclosed is a fault in criticism by counsel of the evidence adduced. Part of that criticism involves the assumption that the commission was bound to believe testimony relied on to support the conclusion that conduct of one of the petitioners did not have

> the meaning or effect indicated by a written communication signed by its representative. It was for the commission to pass on the credibility of that testimony.

Similarly, in *National Harness Mfrs. Assn.* v. *Federal Trade Comm.* (261 Fed. 170), the Circuit Court of Appeals for the Sixth Circuit said:

> The statute further provides that the findings of facts by the commission shall be conclusive, if supported by *any* evidence. It follows that there will be no occasion to resort to the record on which the findings were based, unless it is alleged that there was no evidence to support a particular finding, and then it would be necessary to examine only so much of the evidence as pertained to that subject.

It has been generally held by this court that where a statute makes the findings of fact by an administrative body conclusive if supported by evidence, the administrative body is the judge of the weight and effect of the evidence. In *Interstate Commerce Commission* v. *L. & N. R. Co.* (227 U. S. 88), the court said:

> In a case like the present the courts will not review the commission's conclusions of fact (*I. C. C.* v. *Del., etc., Ry. Co.*, 220 U. S. 251), by passing upon the credibility of witnesses or conflicts in their testimony.

In the instant case the findings of the court, as is demonstrated below, were not in accord with findings of the commission supported by evidence. The right asserted by the court below to make additional

findings deprives the commission of its statutory authority to pass upon the weight and effect of the evidence. Manifestly, the court and the commission may differ on these points, and the finding by the court, therefore, be contrary to a finding by the commission.

If the court of appeals desired findings of fact upon points other than those upon which findings were made by the commission, it should have remanded the case to the commission with instructions to find the facts on these points. This court has consistently held this to be the proper practice in cases arising under the act to regulate commerce (*L. & N. Ry. Co.* v. *Behlmer,* 175 U. S. 648, 675, 676; *I. C. C.* v. *Clyde S. S. Co.*, 181 U. S. 29, 32; *I. C. C.* v. *C., B. & Q. Rd. Co.*, 186 U. S. 320, 340.

In *I. C. C.* v. *Clyde S. S. Co., supra,* this court said:

> In the East Tennessee, Virginia, and Georgia case, just decided, following the ruling made in *Louisville & Nashville Railroad* v. *Behlmer* (175 U. S. 648, 667) and previous cases, we have held that where the commission, by reason of its erroneous construction of the statute, had in a case to it presented declined to adequately find the facts, it was the duty of the courts, on application being made to them, to enforce the erroneous order of the commission not to proceed to an original investigation of the facts which should have been passed upon by the commission, but to correct the error of law committed by that body, and after doing so to remand the case to the commission so as to afford it the opportunity of examining

the evidence and finding the facts as required by law.

The commission's findings were all that were necessary to a decision of the case and this court may therefore reverse the Circuit Court of Appeals on its holding that it has power to make additional findings and at the same time sustain the commission's order.

II.

The findings made by the court are contrary to those made by the commission, and in part contrary to the evidence.

Having held that the commission's findings were supported by evidence, and therefore conclusive upon it, the court, nevertheless, proceeded to make findings contrary to those made by the commission.

The court found:

> These distributing agents, largely drawn from the ranks of the schoolboy salesmen, are, as we have said, the permanent keystones, and the pivotal and controlling factor in the whole plan. * * *

The commission found, and the record fully supports the finding, that of the approximately 1,500 so-called agents of the respondent, "approximately 447 are, and previous to entering into such contracts with respondent were, already engaged in the business of wholesale dealers in newspapers or magazines, or both."

These 447 dealers (the only ones to whom the commission's order applies) were not drawn from the ranks of the schoolboy salesmen. Those wholesale

agents of the respondent drawn from the ranks of its schoolboy salesmen, almost without exception, entered the wholesale business for the first time as representatives of the respondent company and were not affected by the commission's order. The record further discloses that the respondent had, under these contracts, a substantial number of large general wholesale dealers who never belonged to the schoolboy organization of the respondent; or, if they did, had long since left such organization when they became parties to the contract in question.

The court found:

> That the Curtis Company, through a series of years, at large expense and by the creation of personal relations, had built up both a distributing and selling organization that was efficient, personal in character, and that was—substantially—engaged in distributing and selling, exclusively, the Curtis Company's publications. (R. 59.)

This finding of the court is contrary to the finding made by the commission—

> That of such persons, partnerships, or corporations, approximately four hundred and forty-seven (447), hereinafter referred to as "dealers," are, and previous to entering into such contracts with respondent were, regularly engaged in the business of wholesale dealers in newspapers or magazines, or both, and as such are, as aforesaid, engaged in the sale or distribution of magazines or newspapers, or both, for other publishers. (R. 31–32.)

This finding of the commission is amply supported by evidence. (T. 1402–1404.)

> Q. Of those same 471 (wholesale newspaper dealers now carrying the Curtis publications), how many wholesaled the Curtis magazine before they wholesaled any newspaper?
>
> A. Eighty-six. (T. 1403.)

This leaves 385 who were engaged as newspaper wholesalers before representing the Curtis Company.

> Q. Of these two hundred and forty-one magazine wholesalers handling magazines other than Curtis publications, how many were not dealing with other publishers as magazine wholesalers when they began the sale of Curtis publications?
>
> A. One hundred and sixty-nine. (T. 1404.)

This leaves 92 magazine wholesalers who were carrying other magazines when they began the sale of Curtis publications. Three hundred and eighty-five newspaper wholesalers plus 92 magazine wholesalers makes a total of 447 wholesale dealers handling other magazines or periodicals when they began selling Curtis publications.

This testimony was later modified, the witness testifying that his original statement had included some 81 dealers in Canada, and it was sought to correct the testimony in this and some other respects. The following is taken from the later testimony:

> Q. Now, of the thirteen hundred and seventy-five Curtis district agents in the United States investigated, how many were, at the time they took on the wholesaling of the

92 in this paragraph should be 72 and 447 should be 457. Respondent's brief, page 35, properly calls attention to this inadvertent clerical error.

Curtis publications, dealing with other publishers as magazine wholesalers?

A. One hundred and two. (T. 3222.)

Q. How many of the thirteen hundred and seventy-five district agents referred to were, at that time, engaged in the wholesaling of newspapers?

A. Three hundred ninety-four. (T. 3222.)

Whether some of the newspaper wholesalers were also classed by this witness as magazine wholesalers, and therefore whether if the two figures above given be totalled some dealers will be counted twice, does not appear. The total, however, of both classes of dealers would be 496.

In any event, the finding of the commission of 447 is approximately correct.

Instances in the record of testimony of individual wholesale dealers that they had been engaged in the sale of other magazines prior to handling Curtis publications are to be found, among others, at the following places in the record: (T. 330, 332, 353, 365, 470, 530, 536, 555, 581, 594, 601, 630, 662, 694, 705, 722, 768, 770, 825, 855, 879, 899, 1232, and 1684.)

Instances of wholesalers who were generally dealing in newspapers at wholesale prior to selling the Curtis publications are to be found, among others, at the following places in the record: (T. 476, 637, 739, 810, 1214, and 1691.)

Many of the dealers handling newspapers only at the time they began selling Curtis publications have since begun the sale of other magazines. Where such dealers begin to handle Curtis publications, they

should be classed, in any case, as magazine wholesalers. Furthermore, it should be pointed out here that the commission's order applied only to those dealers who, previous to contracting with the Curtis Company, had already become established as wholesale dealers. So far as the commission's order is concerned, therefore, the nature of the business of dealers under contract with the Curtis Company, other than those already established as wholesalers, need not be considered.

The court below found:

> The proof shows that in most localities where this attempt to get the distributing district agents of the Curtis Company to handle their publications was made there were other wholesale distributors already employed in distributing other magazines and through whom these two companies could have distributed their own. (R. 59.)

This finding is contrary to the finding made by the commission that—

> Such established channels are, in most instances, the principal and most efficient, and in numerous cases the only medium for the distribution of such publications in the various localities of the United States. (R. 31, 32.)

This finding is fully sustained by the evidence.

Evidence to support the finding that the wholesale dealer carrying the Curtis publications is the only wholesaler in the locality, is found at, among others, the following places in the record: (T. 151, 152, 153, 185, 231, 232, 233, 234, 235, 236, 266, 267, 429, 526,

549, 584, 590, 609, 652, 687, 694, 712, 733, 742, 754, 763, 791, 835, 849, 905, 1069, 1099, 1182, 1683, 1758, 1854.)

It will be seen, also, that the witnesses testifying that they were the only wholesalers in a given community, were in practically all instances, large and established dealers, with substantial delivery equipment, employes, and other necessary organization for carrying on the wholesale business. The record further shows that in some places the dealer under contract with the Curtis Company was the principal wholesale dealer—the man with an established trade with retail dealers and with boys, with delivery equipment and other necessary organization.

Other findings made by the court are contrary to the weight of the evidence in the record:

The court found:

> The proof shows that 95 per cent of these boys sell only the publications of the Curtis Company. (R. 47.)

If this finding be taken to mean that of the boys who sell magazines on the streets and deliver them at the homes of customers, 95 per cent sell only the magazines of the Curtis Company, the finding is wholly unsupported by the evidence. The so-called Curtis Boys comprise a small percentage of the boys to whom the large wholesale dealers sell newspapers, or magazines, or both (*supra*, p. 11).

The court found:

> After the success of this plan had been demonstrated by the work and money of the Curtis

> Company, it is to be noted as an evidence of business morality among the magazine publishers, that but two of the four hundred magazine's publishers made any effort to take away from the Curtis Company the undivided services of its district agents. (R. 47.)

This finding is wholly contrary to the evidence in the record. Many wholesalers who handle Curtis publications handle at wholesale the magazines or newspapers or both of other publishers (*supra*, p. 10, 11, 26, 27). As a matter of fact the Curtis Company itself was careful to state to many of its so-called agents that it did not object to their wholesaling a number of other magazines. No objection whatever was made to wholesale dealers under contract with the respondent handling the Hearst and Munsey publications and the Warner publications, and very little objection was interposed to handling Collier's and the Literary Digest, unless these papers were sold to boys.

The following excerpts from letters and bulletins of the respondent to wholesale dealers under contract with it are submitted:

> It would be injurious to us for you to permit any of your district agents to feel that we are disposed to play "dog in the manger" in the matter of their wholesaling other periodicals. We are not so disposed. *There are other publications the wholesaling of which we would not object to.* But we prefer not to take the initiative by suggesting any of them to any district agent. It would appear as if we were acting in concert with other publishers—a thing we are not doing. (Com. Ex.

196, Bulletin No. 289, issued by the Curtis Company.)

I should be very sorry should you feel that we are disposed to play "dog in the manger." This is not so. *There are numerous publications which we should be quite willing for you to handle,* and *if in doing so you could materially increase your income, we should be glad of that fact.* (Com. Ex. 124, T. 1064, 1067.)

We hereby notify you that we can not sanction your wholesaling the Pictorial Review to dealers or boys.

With reference to the Warner publications, Motion Picture and Motion Picture Classic: Unless the publishers of these periodicals, or their representatives, should adopt some sales method that would threaten the integrity of our Sales Organization we see no reason to think your acting for them need necessarily result disadvantageously for us. (Com. Ex. 70, T. 765, 766.)

Of course you will not fail to apprehend that our announced policy with respect to the Pictorial Review is not necessarily an indication that our policy would be the same with respect to all other periodicals. On the contrary, we are sure you know that *many of our wholesalers handle periodicals other than our own,* and that *we have helped many of them to get agencies* for other periodicals. (Com. Ex. 71, T. 772, letter of Curtis Publishing Co. to Peers Brothers.)

P. S. There are numerous publications which we should be willing for a district agent to handle if by doing so he could increase his income without disadvantage to us. (Com.

Ex. 92. T. 884, 886. See also Com. Ex. 89, (T. 837, 838).

The court found:

> But from 1912 to 1917 the services of the boys in the organization described had been utilized solely by the Curtis Company. During that time a number of other magazines and periodicals had been wholesaled to retail dealers by some 366 of respondent's district distributing agents out of a total of 1,375. (R. 48.)

This finding is contrary to the evidence, which is clearly to the effect that many of the general wholesale dealers who handled the Curtis publications also sold other magazines and periodicals *to boys* as well as to retail dealers. (T. 1115, 1195, 1203, 849, 519, 534, 540 and 547, 569 and 574, 588 and 590, 602 and 607, 628, 639–640, 650, 651, 694 and 701–702, 795, 820–821, 934 and 947, 1071.) These dealers may not have sold other magazines and publications to boys whose services were, in the first instance, enlisted by the Curtis Company to sell its publications, but they did sell other magazines and periodicals to other boys. The closing of this channel of distribution, namely, boys other than Curtis boys, to competitors, by means of these contracts, is a vital part of this case.

The court found:

> This general plan (of distributing through wholesale dealers to newsstands and to boys) seems to have been original with the Curtis Company, the proof being that at that time there was no other publisher of magazines who

> circulated its magazines through local district agents supplied directly by the publisher and by the boys. (R. 45.)

The record shows, on the contrary, that the work of establishing wholesale dealers in newspapers was largely originated by the newspaper publishers, and prior to the time when the Curtis Company had any substantial sale through general wholesale dealers. (T. 869–871, 951, 955, 976, 984, 1076.)

The evidence shows, and the commission found, that at the time the Curtis Company began to sell to the 447 dealers found to be general wholesalers, such dealers were already engaged in the sale of newspapers or magazines, or both, at wholesale. It matters not, therefore, who first thought of utilizing wholesale dealers in newspaper and magazine distribution—other publishers were using these dealers prior to the Curtis Company.

III.

Both contracts of the respondent company are contracts of sale.

The first contract.

The contract which was the subject of the original complaint is clearly a contract of sale. It provides (T. 193), among other things, that the Curtis Company will "supply the district agent with copies of the Saturday Evening Post and of The Country Gentleman at 2½ cents each, and of the Ladies Home Journal at 9¾ cents each," but if the "agent" fail to prove himself entitled "*to the wholesale rates*," the

Curtis Company "may then charge" an increased price for the papers, or may terminate the contract and appropriate the cash security. It requires that the "agent" "*remit in advance* * * * sufficient to *prepay* for the month's supplies," and that the "agent" shall make a deposit of a specified sum depending upon the number purchased as the first advance payment. This money, it is provided, may be appropriated without notice by the Curtis Company for breach by the "agent" of any covenant in the contract. The company also agreed to "give credit" to the district "agent," "*at the price paid,*" for unsold copies returned in accordance with its regulations. A further important provision is that by which the "agent" obligates himself to sell "at least" a specified number of copies of each of the Curtis Company's publications, and upon failure to do so the Curtis Company may appropriate, without notice, the cash security deposited by the "agent." (T. 193.)

Bearing in mind the character of the business of the wholesale newspaper and magazine dealers as described herein (*ante* pp. 7–12), it is clear that the contract is one of sale and not of agency. The dealers buy the Curtis Company's publications at specified prices and pay for them in advance. Title passes to the dealers who sell on their own behalf and themselves convey title to the purchasers. The dealers are neither factors nor commission merchants, but wholesale dealers purchasing and selling for their

own account as do wholesalers in groceries, drugs, or any other line.

This court has repeatedly held that systems of contracts of this character are contracts of sale and not of agency. (*Standard Fashion Co.* v. *Magrane-Houston Co.*, decided by this court April 10, 1922; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490. See also *U. S.* v. *Schrader's Sons*, 264 Fed. 175; *Park* v. *Hartman*, 153 Fed. 24; *Ford Motor Co.* v. *Union Motor Sales Co.*, 244 Fed. 156.)

The facts and important provisions of the contracts involved in the Miles Medical and Boston Store cases are strikingly like those in the instant case, and this court there held that the transactions amounted to sales.

The particular contract, the legality of which was put in issue by the commission's original complaint herein, was before the Federal District Court for the Southern District of New York, in *Pictorial Review Co.* v. *Curtis Publishing Co.* (255 Fed. 206), and that court held that title to the papers passed to the dealers under the contract, saying, in part:

> I have no doubt that the district agents or dealers who receive from the defendant the Ladies Home Journal and put it on the market are purchasers of the magazine. There can be no question, in view of the payment in advance and the other elements of the transaction, that title to the magazines which the

> wholesale agents received passed to them. They are not mere factors or agents.

In another part of the opinion, the court apparently modifies this statement somewhat by the following expression:

> Looking behind the form of the contract which the defendant makes with its agents to the inherent features of the transaction, I think it may be said that the selling arrangement more nearly resembles an agency conducted by the district agents in cooperation with the Curtis boys than it does an outright sale to the district agents and nothing more.

The mere fact, however, that the wholesale dealers sell the magazines to boys whose interest has been aroused by the efforts of the Curtis Co. does not make the wholesale dealer a factor or agent. It is a common commercial practice for manufacturing concerns to solicit the retail trade direct to purchase their commodities, turning the orders when received, however, through the wholesale dealers from whom the retailers regularly purchase. This practice has greatly increased in recent years among manufacturers who desire to add their own efforts to those of the wholesale trade in actively pushing the sale of their goods with retailers, but who desire, nevertheless, to continue to distribute through the wholesale dealer. The fact that the manufacturer solicits orders which he gives to the wholesale dealer to fill does not make the wholesaler the agent of the manufacturer. He still remains an

independent business man, buying and selling on his own account, and responsible to no manufacturer for the conduct of his own business. The wholesale dealer in newspapers and magazines occupies the same position, and selling the respondent's publications to boys secured by it does not change the wholesaler's legal relation to the respondent nor the character of his business.

The second contract, the subject of the amended complaint, is likewise a contract of sale.

After the filing of the original complaint (T. 1305) the respondent changed the form of its contract with wholesale dealers, and the Commission's complaint was amended to include a charge that this contract likewise was illegal and in violation of section 3 of the Clayton Act and of section 5 of the trade commission act. It is contended that this second contract (Commission's Ex. 189, T. 1294) is likewise a contract of sale, though the court below held it to be one of agency. The contract purports to create the dealer the district agent of the Curtis Company. It provides, among other things, that the company will consign to the dealer such stock of its publications as the respondent finds that the dealer requires; that the title to said publications shall remain with the publisher until they are sold by the dealer; that all sales made by the dealer must be for cash or at the risk of the district "agent"; that on sales made at wholesale the dealer shall have a commission of 1½ cents per copy on sales of the Saturday Evening

Post, 1¼ cents each on sales of the Ladies Home Journal, and 1 cent per copy on The Country Gentleman; that on sales made at retail the dealer shall have a commission of 2½ cents on the Saturday Evening Post, 5½ cents on the Ladies Home Journal, and 3 cents on The Country Gentleman, provided he promptly reports his sales; that the dealer shall send with his weekly order his check or money order for the amount of sales the previous week, less his commissions; that the district agent guarantees, during the continuance of the agreement, that he will sell at least a specified number of copies of each of respondent's publications. The contract requires the dealer to deposit with the respondent, on or before the date of the first shipment under the contract, a specified sum. Provision is also made for the termination by the Curtis Company of the contract for breach of any condition, stipulation, or guarantee, and that on such termination the sum of money deposited shall be retained by the company as liquidated damages. It also appears from the evidence that when the new contract was put into effect the Curtis Company materially increased the cash deposit required of the dealers, and that at all times it has sufficient money to insure payment for the copies of its publications in the dealers' hands. (T. 1308, 3434–3435.)

Whether this second contract is one of agency or of sale must be determined from the surrounding circumstances. Merely styling it an agency contract and the parties principal and agent is not controlling. (*Dr. Miles Med. Co.* v. *Park & Sons Co.*, 164 Fed.

803; *Poirier Mfg. Co.* v. *Kitts*, 18 N. D. 556; *American Seeding Mach. Co.* v. *Stearns*, 109 App. Div. 192; *Henry Bill Pub. Co.* v. *Durgin*, 101 Mich. 458.) Nor will the mere inclusion in the contract of a clause reserving the title in the seller make the contract one of agency or consignment. A contract containing such a reservation may, nevertheless, be one of absolute or of conditional sale. (*Re Carpenter*, 125 Fed. 831; *Sutton* v. *Baker*, 91 Minn. 12; *Poirier Mfg. Co.* v. *Kitts*, 18 N. D. 556; *Arbuckle Bros.* v. *Gates*, 95 Va. 802.)

If the transaction constitutes a conditional sale, it is within the terms of section 3 of the Clayton Act, which covers "a sale or contract for sale" on condition that the purchaser shall not deal in the goods of a competitor or competitors of the seller. There is ample authority to hold that there is here at least a conditional sale, title to pass to the dealers upon resale of the publications. (*Chickering* v. *Bastress*, 130 Ill. 206; *Granite Roofing Co.* v. *Casler*, 82 Mich. 466; *Blow* v. *Spear*, 43 Mo. 496; *Lemp* v. *Ryus*, 7 Colo. App. 37; *House* v. *Beak*, 141 Ill. 290; *In re Morris*, 156 Fed. 597; *Re Carpenter*, 125 Fed. 831; *Re Wells*, 140 Fed. 752; *Re Rose*, 206 Fed. 991.)

A particular feature of the contract which unmistakably stamps it as a contract of sale is found in clause 9, in which the dealer guarantees to sell a specified number of the respondent's magazines. Under clause 13 he is required to deposit money with the respondent, which is held by the latter to insure the faithful performance by the dealer of his

obligations and *guarantees*. The only guarantee which the dealer makes is to sell a specified number of the respondent's publications. If he fails his deposit is liable for the price of those unsold. The respondent's conduct here may be aptly described by the following excerpt from the decision of this court in *Straus* v. *Victor Talking Machine Co.* (243 U. S. 490, 498):

> First, while as if looking to the future, the notice, in terms, imposed various restrictions as to title and as to the "use" of the machines by plaintiff's agents, wholesale and retail, and by the "unlicensed members of the public," for itself the plaintiff makes sure that the future shall have no risks, for it requires that all that it asks or expects at any time to receive for each machine must be paid in full before it parts with the possession of it.

The real character of the transaction as a sale is unmistakably stamped by the circumstances under which the contracts were made. The first contracts were clearly contracts of sale. When the validity of these contracts was questioned and when the Federal district court practically held them to be contracts of sale, the respondent sought, by merely changing the form of the contract, to disguise its purpose and to retain all the benefits of the old contract, including the exclusion of real competitors from the wholesale channels of distribution, and yet by such change of form to escape the prohibitions of the Clayton Act. The real relation of the parties remains the same under the new contract. The

character of the business of the dealers is still that of independent traders, buying and selling for their own account—not as commission men or factors. As such independent dealers they still constitute, in all instances, a valuable channel of distribution for publishers of newspapers and magazines; in many instances they are the only, and in others the most important, wholesale outlet for such publishers.

In the words of Lurton, J., in *Park* v. *Hartman* (153 Fed. 24)—

> To call such a purchaser an agent is to juggle with words.

He is in fact the purchaser, having before the receipt of the publications deposited ample funds to secure their payment.

In the *Dr. Miles*, the *Boston Store*, the *Victor Talking Machine*, and the *Schrader* cases cited (*supra*, p. 36), the manufacturers sought by the form of their contracts with dealers to retain title to goods sold in order to control the resale prices thereof and thus eliminate competition. But this court, looking through the form to the realities of the transactions, held that competition among distributors could not thus be eliminated. In the instant case, the respondent seeks by a similar subterfuge to lessen competition by preventing its competitors from selling through established wholesale dealers, and this court will in like manner discern the subterfuge and declare its unlawful effect.

IV.

Respondent violates section 3 of the Clayton Act.

If, as contended, the respondent under both of its contracts (Exs. A, and 189, T. 193, and T. 1294), sells its publications to the dealers, it violates section 3 of the Clayton Act. That section provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

An analysis of this section reveals that it prohibits (1) leases and sales or contracts for sale, (2) the fixing of a price, (3) the making of a rebate from the price, (4) the making of a discount from the price, *on the condition, agreement, or understanding that*

the lessee or purchaser shall not use or deal in the goods, etc., of a competitor or competitors where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce. That respondent's contracts with dealers are contracts for sale, either absolute or conditional, and not contracts of agency, has been previously discussed.

Respondent's sales are made upon the condition that the dealer shall not deal in the publications of competitors.

Respondent's sales of its publications are made upon the condition that the purchaser shall not deal in or handle at wholesale the publications of competitors without its consent. The proof shows that this consent has been uniformly withheld as to certain class of publications (*ante*, p. 14) and that in many cases the dealers have, because of the withholding of the respondent's consent, declined to handle competing publications. Clearly, therefore, the respondent's sales are upon the condition that the dealers shall not deal in the publications of competitors. If it be urged that the condition not to deal in the publications of competitors does not appear absolute in the terms of the contract, the respondent's subsequent refusal to permit dealers to carry competing publications and compliance therewith by the dealer consummates the prohibited agreement.

The effect of the respondent's sales and contracts for sale is to substantially lessen competition.

To determine whether the effect of the respondent's contract "may be to substantially lessen competition or tend to create a monopoly" requires, first, an

interpretation of these terms, which are new to the law. Light may be had on this point from a consideration of the state of the law at the time the legislation was enacted, and the mischief sought to be remedied.

In many cases prior to the passage of the Clayton Act, efforts had been made both by the prosecuting officials of the government and by counsel for private litigants to have the courts declare that sales or contracts for sale, upon condition of exclusive patronage, as well as deferred rebates and special discounts made upon the same conditions, violated the Sherman law because of the effect to restrain trade within the meaning of section 1 of that act, or because they constituted an attempt to monopolize within the meaning of the second section. The courts, with one or two exceptions, had held that such contracts and offers of rebates and discounts did not violate the act.[2]

These persistent efforts doubtless impressed Congress with the desirability of prohibiting these practices by special enactment, which was done in section 3 of the Clayton Act. But inasmuch as these prac-

[2] The following cases held such contracts and offers did not constitute violations of the Sherman law. *Wilder* v. *Corn Products Mfg. Co.*, 236 U. S. 165, 172–173; *In re Greene*, 52 Fed. 104, 117–118; *Olmstead* v. *Distilling Company*, 77 Fed. 265; *In re Corning*, 51 Fed. 205; *In re Terrell*, 51 Fed. 213; *U. S.* v. *Prince Line*, 220 Fed. 230, 233; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, 461, 463. Cases holding contracts requiring exclusive dealing to be unlawful are: *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 738, 744 (1913), s. c. 217 Fed. 656, 659, 660 (1914); *United States* v. *Keystone Watch Case Co.*, 219 Fed. 502 (1915). It will be seen that one of the three decisions condemning such arrangement was handed down in the same year in which the Clayton Act was passed and another in the succeeding year.

tices had been repeatedly held not to restrain trade or to amount to an attempt to monopolize, Congress, unless it desired to prohibit them absolutely, was compelled to adopt other language than that of the Sherman law—to establish a new and different standard of legality. It did this by the use of the words "if the effect may be to substantially lessen competition or tend to create monopoly."

Concerning this section, this court has said:

> The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own * * *. (*Standard Fashion Co.* v. *Magrane-Houston Co.*, decided by this court on April 10, 1922.)

While thus holding that the Clayton Act establishes a new standard of legality by which the practices embraced within section 3 are to be judged, the court does not discuss at length the interpretation to be given to the section.

It is submitted that the expressions "substantially lessen competition, or tend to create a monopoly" in sections 2, 3, and 7 of the Clayton Act are to be interpreted in the light of the character of the particular practices prohibited by each of these sections and the manner in which such practices would lessen competition.

Referring to section 3 of that act, it is submitted that the quality or character of the restraint imposed by sales, contracts for sale or rebates, or special dis-

counts, in consideration of exclusive dealing, is always the same. It is merely that of exclusion. Such arrangements lessen competition by closing the avenues of trade to all competitors to the extent to which such contracts or arrangements are made and for the period of such contracts or arrangements. In the language of the District Court in *United States* v. *United Shoe Machinery Company* (264 Fed. 138, 168):

> This places it in the power of the lessor to substantially lessen competition in this line of trade, and therefore is obnoxious to the statute. As stated in *Patterson* v. *United States* (222 Fed. 596, 620; 138 C. C. A. 123, 144), "But, though but one competitor can make a sale, all competitors can enjoy the free opportunity of approaching each and every prospective purchaser on equal terms with the chance of making a sale if he can persuade him to buy. For one competitor to exclude all, or substantially all, other competitors from such opportunity—i. e., drive them from the field of freely offering their goods so as to have that field to himself—is to monopolize, according to the legal and accurate sense of the word."

Obviously, if one manufacturer should enter into exclusive sales contracts with all of the wholesalers in a particular line in the United States for a period of ten years, all competition for the business of such wholesale dealers would be eliminated and the manufacturer would enjoy an absolute monopoly for that period except so far as other wholesalers might enter

the business, a prospect fraught with too much uncertainty to warrant competing manufacturers in operating their plants. Similar contracts with a substantial number of the jobbers would "substantially lessen competition," since the effect would be to eliminate all competition for the business of those jobbers and to exclude competing manufacturers' goods from the shelves of the retailers served by those jobbers.

The quality or character of the restraint under this section being always the same—that of exclusion—whether or not the lessening of competition which flows from it is substantial is largely a *quantitative* question. To determine this, the size of the organization making the contracts, the number and size of its competitors, the number of dealers—(if the corporation or organization sells to dealers as distinguished from consumers), actual or potential customers in that particular line—the number of dealers who are under such contracts or arrangements, and the size or importance of such dealers, are the principal factors to be considered in determining whether the lessening of competition is substantial or whether it is inconsequential. If competitive access to the market is in substantial degree closed, then the lessening of competition is substantial. Under the express wording of the statute, if the lessening "may be" substantial, the law is violated.

In the instant case respondent is a large corporation, the combined circulation of its publications greatly exceeding in number those of any immediate

competitor. It has contracts by which it may and does prevent these publishers, whom it regards as real competitors, from selling their publications to the principal local wholesale dealers in the United States, and from reaching, through these dealers, many retail news stands and hundreds of boys who are reached only through such wholesale dealers. These dealers, the Commission found, and the record proves, are in most instances the principal and most efficient, and in numerous cases the only local wholesale dealers, for the distribution of such publications in various localities in the United States. In the language of the Circuit Court (Judges Buffington, Hunt, and McPherson), in *United States* v. *Keystone Watch Case Co.* (218 Fed. 502, 511–512):

> * * * it should be observed that they were already established customers, not only of the defendant company but also of its competitors and had already become trade outlets for every manufacturer of goods whose wares they had been accustomed to buy. Now, what the defendant did was either to close these already existing and already utilized outlets, or to narrow them materially so far as the goods of its competitors were concerned; and we think the proposition need not be discussed that this was pro tanto a direct and unlawful restraint of trade.

The effect of the contracts is practically to close one of the great avenues of distribution to its competitors. The lessening of competition resulting therefrom is substantial.

Attempt was made by respondent to show that it objected to wholesale dealers under contract with it carrying other publications, because of the fact that it would so occupy their time or facilities that their sales of Curtis publications would be impaired. In so far as the class of dealers to which the Commission's order applies is concerned, there was an utter failure to establish this contention. There is abundant evidence to show not only that the large wholesale dealers could sell other publications without lessening the sales of the Curtis Company's papers, but that the increased business would enable them to maintain better facilities and give better service to all (*ante*, p. 18). The testimony of one of respondent's representatives, who handled the Pictorial Review for a time, shows that there was, during a period of eight months, a steady increase in the circulation of respondent's publication, the Ladies' Home Journal. The following is from this witness's testimony (T. 3364–3371).

Issue.	Ladies' Home Journal.	Pictorial Review.
May	4, 192	2, 509
June	3, 921	2, 536
July	4, 262	3, 265
August	4, 407	2, 418
September	4, 642	3, 243
October	5, 091	3, 781
November	5, 272	4, 272
December	5, 897	3, 664

That the respondent's true purpose was to hamper and obstruct its immediate competitors is proven by the fact that it was entirely willing for dealers to handle noncompeting publications and frequently so stated (*ante*, pp. 31, 32) and also by its own declarations, as witness the following:

> We are for everything that makes for permanent mutual advantage for you and for us; and there are numerous publications which we should be quite willing for you to wholesale if by doing so you could increase your income without disadvantage to us.
>
> But there is a reason why this does not apply to the Pictorial Review. *In the first place, the publication purports to be a competitor or potentially a competitor of The Ladies' Home Journal.* [Italics ours.] (T. 1513, Commission Ex. 197.)
>
> It may well put a different face on the matter, *especially when it comes to the circulation of magazines which are genuine competitors, both in respect to their make-up and amount of circulation.* (T. 1906–1909; T. 2712–2713, Ex. 5.)
>
> See also Commission's Ex. 64, T. 714–715.

It is no justification of respondent's contracts or conduct to say that its competitors may utilize the United States mails and the American News Company. Respondent's competitors are entitled to utilize all established channels of distribution, and the express purpose of section 3 of the Clayton Act was to establish that right beyond question. It would have been as much in point for this court, in

Standard Fashion Co. v. *Magrane-Houston Co., supra,* to have held that the contracts of the Fashion Company did not restrict the competition of competitors because, forsooth, they could go into the mail order business and sell direct to the consumer.

Furthermore, the record discloses that respondent itself, as well as other publishers, had found that the American News Company did not cover the field as effectively as did local wholesale dealers, and did not reach the boy salesmen at all, and for this reason had abandoned distribution through the news company and resorted to wholesale dealers (T. 111, 229, 3346, 3352).

In addition to the facts heretofore set forth showing that both dealers and boys other than Curtis boys can be much more effectively reached through these wholesalers than through the American News Company, it may be here noted that the circulation of the Literary Digest increased from 174,500 copies per week to 287,641 copies per week within one year after the publishers began distribution through wholesale dealers (T. 3346, 3352), and that an official of the Crowell Publishing Company, a man experienced in the circulation of periodicals, stated that in his judgment the sales of single copies of that company's papers, the Woman's Home Companion, Every Week, American Magazine, and Farm and Fireside, could possibly be doubled if they could sell them through wholesale dealers (T. 111). It also appears in the record that at the present time the respondent company, which deals with the American

News Company on a nonreturnable basis, sells through that medium only about 100,000 copies of the Ladies' Home Journal per month, as against a total circulation of 1,700,000 copies. Examples of the inferior service rendered by the News Company as compared with that of the local wholesalers may be found in the testimony of E. H. Johnson, director of the American News Company (T. 2597–2598, 2602, 2609, 2619–2620, 2629, 2650). Other testimony to the same effect may be found in the record (T. 140, 141, 142–144, 4914–4915, 4905). Mr. Beck, second vice president of the Crowell Publishing Co., also testified:

> As previously stated, I believe there are twelve or thirteen hundred of the wholesalers, and the American News Company has only sixty branches, and naturally we [would] get better service and better distribution (T. 108).

It should also be borne in mind that the commission's order only prohibits respondent from entering into or enforcing contracts with wholesale dealers established as such prior to sale of respondent's publications—such dealers found to be some 447 in number—and does not disturb the respondent's contractual relations with its other representatives, sometimes also called wholesale dealers. The court below evidently failed to recognize this fact and misconceived the scope and effect of the commission's order, for it states:

> * * * stated in the common business thought of those in that branch of commerce,

is it evidence of unfair business in magazine publishing to have an exclusive distributing agent.

The respondent has approximately 1,088 so-called agents under contract not to handle competing publications without its consent, whose relations with it were in no wise affected by the commission's order, these agents at the time of the making of such contracts not being established wholesale dealers. Nor was respondent restrained by the order from employing as many such representatives as it desired.

The court below was apparently led into error by failure to distinguish between what some of respondent's competitors may have desired to do, and endeavored to have the commission do, and what the commission actually sought to accomplish by its order. The court dwells at great length upon the effort of certain of respondent's competitors to utilize respondent's school-boy organization. It quotes at length the testimony of a number of wholesale representatives of the Curtis Company, who relate the efforts of the representatives of certain competing companies to sell to them and through them to boys (R. 49–59). *The court utterly failed to note that the relations of not a single one of these witnesses with the Curtis Company were in any wise affected by the commission's order,* since they did not fall within the class of wholesale dealers who had, previous to beginning the sale of the Curtis publications, been engaged in the general wholesale business, and as such in

handling newspapers or magazines, or both, of other publishers. The witnesses whose testimony was quoted were, for the most part, developed from boys selling Curtis publications at retail. The court erroneously construed the commission's order as directed against such wholesalers. Testimony of this character forms apparently the basis of the court's decision and doubtless, in large measure, accounts for its erroneous conclusion.

Further evidence that the Court of Appeals misapprehended the commission's order and findings is found in its reference to the decision in *Pictorial Review Co.* v. *Curtis Pub. Co.* (255 Fed. 206) where, so far as the decision discloses, the issue was whether the Pictorial Review Company could avail itself of the Curtis Company's boy organization. In this case the issue is very different, namely, whether the Curtis Company may lawfully prevent, by contract, the principal and most efficient wholesale dealers throughout the United States from handling the publications of competitors.

V.

Respondent's contracts constitute an unfair method of competition.

If the petitioner's contention that the respondent's contracts with wholesale dealers are contracts of sale or that at least title to the publications passes to the wholesaler on resale be not sound, and respondent's contracts are in form agency contracts and there is, therefore, no violation of section 3 of the Clayton Act,

nevertheless the use of these contracts constitutes an unfair method of competition. The effect of the contracts to substantially lessen competition is identical, whether in form they be contracts of agency or contracts of sale. That effect has previously been discussed in this brief (*ante*, pp. 48–49, 51–53). If we are sound in the conclusion respecting their restrictive effects, then the respondent can not escape the prohibition of section 5 of the trade commission act by the form which its contracts take. This court has held in the *Gratz case, supra*, and more recently in *Federal Trade Commission* v. *Beech-Nut Packing Co.* (42 Sup. Ct. 150), that the prohibition against the use of unfair methods of competition extends to all practices contrary to public policy "because of their dangerous tendency unduly to hinder competition or create a monopoly." In the *Beech-Nut case, supra*, where the company sought to escape the prohibitions of the Sherman law by the use of a merchandising policy which it was stipulated did not amount to a system of contracts requiring the maintenance of resale prices by dealers, but which was found to accomplish the same suppression of price competition which had theretofore been effected by contracts, this court held that the Federal trade commission act applied. Taking as the test of legality under section 5 of the trade commission act the effect of the practice upon competition, the court said:

> If the Beech-Nut system of merchandising is against public policy because of its dangerous tendency to unduly hinder competition

> or to create monopoly it was within the power of the commission to make an order forbidding its continuation. * * *
>
> From this course of conduct the court may infer, indeed can not escape the conclusion, that competition among retail distributors is practically suppressed for all who would deal in the company's products are constrained to sell at the suggested prices.

In the two decisions last above mentioned, and in the decision in *Federal Trade Commission* v. *Winsted Hosiery Co.* (decided by this court on Apr. 24, 1922, 42 Sup. Ct. 384), this court holds that the language of the trade commission act is sufficiently inclusive to reach all acts or practices which have the prohibited effect of unduly hindering or suppressing competition.

In the *Beech-Nut case* the court remarks that the Sherman law may be looked to as showing a declaration of public policy to be considered in determining what methods of competition are unfair. Similarly, in the instant case, the public policy is clearly shown in section 3 of the Clayton Act, the broad purpose of which is to prevent manufacturers or others from restraining dealers and purchasers, by contract or condition, from handling or purchasing the goods of competitors, where the effect may be to substantially lessen competition. In like manner where the results prohibited by section 3 are accomplished through contracts which are in form contracts of agency, but where the surrounding facts disclose that the so-called agents are in fact wholesale inde-

pendent traders, and the real purpose of the contracts is to exclude competitors from the usual channels of distribution, this court will apply the provisions of the trade commission act and declare the use of the contracts to be an unfair method of competition. Support is found for this reasoning in the decision of the Circuit Court of Appeals in *Dr. Miles Medical Co.* v. *Park & Sons Co.* (164 Fed. 803), where Lurton, J., speaking for the court, says:

> The effect of that contract with jobbers, whether it be regarded as one of sale or of agency, is to restrain jobbers from selling to any save retailers licensed by complainant, and to restrain retailers from selling for resale to any save those licensed to buy or to persons who buy for consumption only, and to none, by either jobber or retailer, except at a price imposed by the manufacturer. The confessed object of this plan or system is to obtain a price to the jobber and to the retailer unaffected by any competition between them. The scheme is one to enhance or maintain prices by eliminating all possibility of competing rates between either jobbers or retailers, and is quite as effectual in its results as if the contract with the jobber was plainly one of sale.

In interpreting and applying the trade commission act, the court below clearly was of the opinion that the terms "unfair methods of competition," as used in the act, were synonymous with the terms "unfair competition" or "unfair trading" as known to the common law and to equity jurisprudence (R. 65–67).

The court evidently had not seen, or else ignored, the decision of this court in the *Gratz case, supra*, and therefore erred in its interpretation. While under the decisions of this court the prohibition against unfair methods of competition may include a case of unfair trading at common law, since such methods of competition are contrary to good morals because characterized by fraud, it also includes those practices which are in no wise characterized by fraud but which have a dangerous tendency unduly to hinder competition. This phase of the prohibitions of the statute the court below did not consider at all, and it is under this phase that the respondent's conduct should be judged.

VI.

Protection of respondent's schoolboy organization does not justify its contracts.

Conceding *arguendo* that the respondent has a right to protect its so-called schoolboy organization, nevertheless its contracts with general wholesale dealers go far beyond the protection of this organization.

As previously pointed out (*ante*, pp. 10–11), these general wholesalers sell newspapers or magazines, or both, (1) to retail news dealers, (2) to boys who sell newspapers only, (3) to boys who sell newspapers and magazines, including sometimes Curtis publications, but whose services were not enlisted by the Curtis Company or by its agents, and (4) to boys who sell Curtis publications only. If, therefore, the Curtis

Company has a legal right to protect its schoolboy organization, this right would be exercised to its limit if its contracts with general wholesale dealers prohibited them from selling other magazines to *Curtis* boys, leaving the wholesaler free to sell to, and competing publishers selling through him free thus to reach, all retail news stands, which are in no wise connected with the Curtis Company, and all boys who bear no relation, contractual or otherwise, to that company. Such a contract would not violate the commission's order. Respondent is not content to do this, but requires such general wholesale dealers not to deal in or handle at wholesale the publications of its immediate competitors, thus closing to competitors a very large field, which certainly is not the property of respondent.

VII.

Respondent does not have any exclusive right to the so-called schoolboy organization.

Thus far in this brief we have not discussed in detail what is called the respondent's "Schoolboy Organization," for the reason that, as stated in the preceding section, the commission's order, properly interpreted, does not disturb respondent's relation to that organization. It may be noted here that counsel for the Commission objected to the introduction of evidence relating to the building up of this organization (R. 1332–1333; 2101). Since, however, the court below

held that respondent's exclusive right to this organization is the controlling factor in the case, and approved the holding of the District Court in the Pictorial Review case (*Pictorial Review Co.* v. *Curtis*, 255 Fed. 208) that for other companies to seek to sell their publications to these boys through wholesale dealers would itself be unfair trading, the nature of the respondent's right in this so-called organization will be briefly considered. A statement of the work done and expenditure made by the respondent in enlisting boys to sell its publications will be found in the opinion of the court below (R. 39–47); in fact, the entire opinion is devoted to the boy organization, to the utter disregard of the distribution at wholesale of newspapers and periodicals.

Whether the 35,000 or 40,000 boys who sell respondent's publications be regarded as merchants, or whether the sale by the boys be regarded as in the nature of personal service, respondent can not have, at the common law, any exclusive right in their patronage or services, save as it rests in contract. It does not appear of record, nor has respondent made any claim, that it has any contracts with the boys under which they agree either as merchants or as agents not to sell competing publications. The boys purchase the papers from the local dealers at stated prices and sell them either to regular customers or to chance purchasers on the streets. They do not enjoy any return privilege, but must pay for

their entire purchases whether sold or not. Nor is there in the record any proof that the boys have any contract of employment with the respondent. Clearly, therefore, they are, under all principles of common law, free to purchase and sell the publications of, or to work for, any publisher whom they may desire. The corollary of this right, is the right in all others to persuade the boys to purchase from or serve them.

But the court below appears to find some equitable right of respondent in the patronage or services of these boys which would be invaded by any competitor who sought to induce the boys to sell its publications; and apparently held that any such effort on the part of other publishers would amount to unfair competition or unfair trading.

It is submitted that there is no decision of this court, nor of any inferior Federal court, which will sustain the theory of the court below. Unfair trading at the common law and in equity consists in the passing off, by sale, of the goods of one person as and for those of another. The basis of the doctrine is deception. Clearly there is no such question involved here. There is no contention whatever that respondent's competitors are seeking to pass off any of their publications as and for those of the respondent. No confusion whatever respecting the identity or source of the various competing publications has occurred or can occur. The position of the court below must, therefore, be based upon some other conception of unfair trading. Apparently the only decision of this court which could conceivably be invoked to support

the decision below is that in *International News Service* v. *Associated Press* (248 U S. 215). In that case, however, the Associated Press had gathered news and had put it in form in which it could be the subject of purchase and sale, and the court held that there was a quasi property in it which should be protected until the Associated Press had reaped the benefits of its labor in collecting and putting it in salable form. The International News Co. was actually taking the *subject* of this quasi property and selling it as its own. In the instant case respondent clearly has no property right, or quasi property, in the patronage or services of these boys. Its good will in the patronage of the boys, which is merely the probability that they will return to purchase more papers, does not include the right to enjoin others from selling to them if they can. This the respondent could do if the decision of the court below, and of the District Court in the Pictorial Review case, supra, be sound.

Some of the reasoning in decisions of the lower Federal courts, which were largely relied upon by counsel for the Associated Press in the International News case (*Prest-O-Lite Co.* v. *Davis*, 209 Fed. 917, 215 Fed. 349; *Search-Light Co.* v. *Prest-O-Lite Co.*, 215 Fed. 692; *Prest-O-Lite Co.* v. *Avery Lighting Co.*, 161 Fed. 648: *contra Prest-O-Lite Co.* v. *Auto Co.*, 191 Fed. 90) possibly, in a measure, supports the decision of the court below, although in all of them there was an element of passing off of one commodity for another. There was in those decisions, however,

some reasoning to the effect that because the plaintiff had spent large sums of money in establishing what was alluded to as a "business system," which consisted in an arrangement with independent dealers through which its empty tanks for automobile gas could be exchanged for filled tanks, competitors could not sell their product to these dealers. But if the mere expenditure of money to popularize a new but unpatented and unpatentable commodity is to be made the basis of a perpetual monopoly in its sale, then, indeed, must our legal and economic systems be revolutionized. If he who first sells a new but unpatented breakfast food may perpetually enjoin others from selling the same food on this ground; if he who first sells an old article in a new market may exclude others therefrom on the ground of his expenditure in creating a demand for it; if he who, by advertising, personal solicitation, or otherwise, and at whatever expense, first induces wholesale druggists to embark in the sale of lines not theretofore sold by them, may, under the doctrine of unfair trading, enjoin others from selling the same or like commodities to such wholesalers, then may we expect to see every new development in business, whether in the sale of new commodities or in methods of distribution, perpetually monopolized by single persons or corporations.

The reasoning which supports this theory is rejected by several of the inferior Federal courts, in well-considered opinions:

> Appellant shows that it expends vast sums in advertising its product, while defendant

expends comparatively small sums for that purpose, and yet that the sales of the latter have materially increased. It is argued from this that defendant is profiting from the demand created through appellant's large expenditures. The inference thus drawn, and it is only an inference, certainly derives no support from any suggestion ever made by appellant that defendant is even a producer of the article; and the inference is subject to a severe, if not a fatal, strain when it is considered that its effect would be to prevent another from honestly producing and selling his article unless he were prepared and willing to expend money in exploiting his product equally with his competitor. At most, then, whatever advantage defendant may derive through appellant's advertising expenditures, the advantage can not rightfully be said to have been received through any act of fraud or unfair trade; and hence the inference might, for the sake of argument, be conceded, and still such an advantage would have to be treated purely as an incident to defendant's rightful pursuit of a lawful business, and as an advantage voluntarily bestowed by appellant. (*Kellogg Toasted Corn Flake Co.* v. *Quaker Oats Co.*, 235 Fed. 668–669.

(See also, *Eisenstadt Mfg. Co.* v. *J. M. Fisher Co.*, 232 Fed. 957; *Meccano* v. *Wanamaker*, 250 Fed. 450; *Hubbell* v. *General Elec. Co.*, 262 Fed. 155.)

As the law has stood for decades, no man can monopolize new ideas save as he may protect them by patent or copyright, or as they may be incor-

porated in secret formulæ, processes, etc. The individual citizen may not publicly use and still keep for himself many of his ideas. Doubtless, in most cases, however, he receives more than he gives, since in exchange for what he gives to the world he may draw from all the rest of mankind. Nor does the expenditure of money in exploiting his ideas change his legal right. Doubtless the benefit of the advertising of each manufacturer of approximately the same class of automobiles inures in a measure to all others, since the sum total of the result of all advertising is to increase the demand for such wares, but no particular advertiser can be heard to complain of this.

In the instant case the respondent has spent large sums in advertising and in the expenses of traveling salesmen, to induce boys to sell its publications, and has distributed, at large expense, printed pamphlets and other literature to assist boys in their work. But the incurring of this expense does not give the respondent an exclusive right to the patronage of the boys or even to their services. What it has done is not different in principle from what every business man does who induces dealers to handle new lines, or employs inexperienced men and by such employment affords them an opportunity to learn a particular business. In either case the business man has no right to exclusive patronage or services save as it can be found in contract.

Even if the court below were correct in its statement of the law, the basis of fact which it finds or assumes to

support it is not correct. The respondent was not the first publisher to sell through wholesale dealers. Pioneer work of this character was done by the daily newspapers in distributing their publications in cities other than those of publication. The testimony of the witnesses Rose (T. 976–984), Annenberg (T. 949–956), and Schloz (T. 137) shows that many wholesalers were established by joint efforts of the newspapers, and that respondent later sold its publications, in part, through these wholesalers. It also appears from the testimony of these and other witnesses that the newspapers, and the wholesale dealers cooperating with them, did the same sort of work in securing boys to handle papers, visiting schools, and advertising in the papers for this purpose; in establishing routes and additional news dealers; in teaching the boys methods of sale, offering prizes to the best salesmen among them, as was subsequently done by the respondent. (T. 978–980, 869–871, 1076.) Respondent now sells to many boys who were originally trained as newsboys. (T. 137, 490–519, 538, 735, 1107.)

The respondent company, with its large financial resources, has simply done on a larger scale, and possibly with more thoroughness, that which had formerly been done by others. It has itself profited by this work done by others, but claims an exclusive right to profit by its own labors in that direction. It seeks to create a new monopoly, not in ideas, but in human labor, and this without even a pretended legislative sanction.

CONCLUSION.

It is respectfully submitted that the judgment of the court below should be reversed, and the commission's order sustained.

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